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# Sanchez v. State Respondent's Brief Dckt. 40579

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Supreme Court \_\_\_\_\_ Court of Appeals \_\_\_\_\_  
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## STATEMENT OF THE CASE

### Nature of the Case

Jose Manuel Sanchez appeals from the district court's summary dismissal of his petition for post-conviction relief, and denial of his request for appointment of post-conviction counsel.

### Statement of Facts and Course of Proceedings

A jury convicted Jose Manuel Sanchez of 112 counts of aggravated battery. State v. Sanchez, Unpublished Opinion No. 415, pp. 1-4 (Ct. App. 2011). The victim of his crimes is Sharon Tusi, with whom he was in a sexual relationship from 1992 to 2007. Id. At trial, the state put on evidence of Sanchez's escalating psychological and physical abuse of Tusi. Id. Within the first year, Sanchez accused Tusi of having sex with other men, and convinced Tusi that he had people watching her who would scalp her for her promiscuous conduct. Id. at 2. Fearing graphic threats of torture by the "people," Tusi obeyed "their" command to shave her own head, eyebrows, eyelashes and crotch. Id.

Starting in 1993, Sanchez physically beat Tusi, forcing her to falsely confess to accusations that she had had sex with others. Id. at 3. By 2007, Sanchez convinced Tusi to pull out her own teeth, or the people would do it for her. Id. In August 2007, Tusi allowed Sanchez to attempt to sew her vagina shut, to stop her alleged infidelities. Id. Believing she could save her life and placate Sanchez and the people, Tusi suggested burning her buttocks, abdomen and vagina in the shape of a bikini, as a "solution" to her unfaithfulness. Id. at 4. Every day for four months, Sanchez burned Tusi in this way. Id. Finally, in

December 2007, Tusi told her daughter about the burnings, but asked her not to tell anyone yet. Id. That night after Sanchez burned Tusi, the two struggled and Sanchez began beating Tusi; Tusi managed to call her daughter, who immediately contacted the police. Id. The police arrived within minutes and arrested Sanchez. Id.

The district court sentenced Sanchez to a prison term of 24 years fixed and eight indeterminate. (R., pp. 1, 61, 104.) Sanchez appealed, and the Idaho Court of Appeals affirmed the district court's judgment of conviction. State v. Sanchez, Unpublished Opinion No. 415 (Ct. App. 2011).

Sanchez filed a petition and supporting affidavit for post-conviction relief. (R., pp. 1-15.) In it he asserted 12 errors of law by the trial court, a constitutional challenge to his sentence, four claims of ineffective assistance by trial counsel, and a claim of ineffective assistance by appellate counsel. (R., pp. 2-11.) Sanchez also requested appointment of counsel to assist with his post-conviction matter. (R., pp. 16-18.) The district court denied appointment of counsel, reasoning that Sanchez's petition includes "no allegation in the petition that raises the possibility of a valid claim such that appointment of counsel is appropriate." (R., pp. 26-31.) After consideration of Sanchez's petition (R., pp. 1-12), the state's answer (R., pp. 60-63) and motion for summary dismissal (R., p. 66-67), and Sanchez's opposition to dismissal (R., pp. 69-73), the district court



entered a Decision On Motion for Summary Dismissal (R., pp. 99-115<sup>1</sup>). Sanchez now timely appeals. (R., pp. 117, 119-121.)

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<sup>1</sup> The district court's decision appears to be missing part of at least one sentence, between pages six and seven, in the Standard of Review section. (R., pp. 104-05.) None of the district court's analysis of the issues is missing.

## ISSUES

Sanchez, representing himself, states the issues on appeal as:

1. Did the prosecuting attorney properly preserve issues presented by Appellant in his Answer and Motion Dismiss?
2. Are issues presented in this Post-conviction claims viable claims under Unified Post-conviction Relief?
3. Did the district court exceed its authority to supplement prosecutor's 1 page Dismissal?
4. Did the district court err in not appointing counsel in the post-conviction?
5. Was petitioner-appellant denied his 6th Amendment Right to Counsel at trial, appeal and post-convict?
6. Did the district court deny Appellant numerous rights at trial? (which the Court would not address) (Clerks record #2 thru #7)

(Appellant's brief, p. 10 (verbatim).)

The state rephrases the issues as:

1. Did Sanchez fail to assert a viable claim so as to warrant appointment of post-conviction counsel?
2. Has Sanchez failed to show error in the district court's summary dismissal of his post-conviction petition?

## ARGUMENT

### I.

#### Sanchez Failed To Assert A Viable Claim So As To Warrant Appointment Of Post-Conviction Counsel

##### A. Introduction

Sanchez contends the district court erred in denying his motion to appoint post-conviction counsel, filed contemporaneously with his petition. (R., pp. 16-19.) However, Sanchez's petition raised no claim with a reasonable chance of survival, even with assistance of counsel. As shown herein, applicable law thus supports the district court's decision denying counsel.

##### B. Legal Standard

"If a post-conviction petitioner is unable to pay for legal representation, the trial court may appoint counsel at public expense." I.C. § 19-4904; Judd v. State, 148 Idaho 22, 24, 218 P.3d 1, 3 (2009). Whether to appoint counsel is in the court's discretion. Melton v. State, 148 Idaho 339, 341, 223 P.3d 281, 283 (2009) (citation omitted). Before denying a petition on the merits, the court must first determine, upon careful consideration of the request for representation, if petitioner is entitled to court-appointed counsel. Id. at 342, 223 P.3d at 284. The district court should appoint counsel if the post-conviction petition's allegations show "the possibility of a valid claim such that a reasonable person with adequate means would be willing to retain counsel to conduct a further investigation into the claim." Melton, 148 Idaho at 342, 223 P.3d at 284 (quoting Swader v. State, 143 Idaho 651, 654-55, 152 P.3d 12, 15-16 (2007)). Stated another way, the court considers whether petitioner could "properly allege the

necessary supporting facts” if given notice of the court’s intent to dismiss and “an opportunity with counsel.” Charboneau v. State, 140 Idaho 789, 793, 102 P.3d 1108, 1112 (2004) (Charboneau I).

Arguing that the district court erred in failing to appoint post-conviction counsel, Sanchez cites Martinez v. Ryan, 132 S. Ct. 1309 (2012). The Martinez court held that inadequate counsel in state post-conviction proceedings may establish cause for failure to raise ineffective assistance of trial counsel claims in later federal habeas proceedings. Id. Sanchez’s matter is not now before a federal habeas court. Also, Sanchez raised ineffective assistance of trial counsel claims in his post-conviction petition. (R., pp. 8-9.) Thus, Martinez is inapposite.

Under applicable case law, Sanchez’s claims were either barred or plainly unsupported as a matter of law.

#### C. Claims Barred By Res Judicata

Where issues have been raised and considered on direct appeal, they are barred from further consideration under res judicata. Parrott v. State, 117 Idaho 272, 274, 787 P.2d 258, 260 (1990). Most of Sanchez’s allegations of erroneous evidentiary rulings were raised and decided on direct appeal. See Sanchez, Unpublished Opinion No. 415 (Ct. App. 2011). These allegations concerned “prior bad acts, relevancy, prejudice, psychiatric expert testimony, domestic violence expert testimony, and motion to sever.” (R., p. 3-5, 9-10, 109 n.19.) Because the Court of Appeals already considered and ruled on these issues, they are barred under res judicata. Parrott, 117 Idaho at 274, 787 P.2d at 260.

D. Claims Barred Under I.C. § 19-4901(b)

A post-conviction petition's claim that could have been raised on direct appeal but was not is barred unless it raises "a substantial doubt about the reliability of the finding of guilt and could not, in the exercise of due diligence, have been presented earlier." I.C. § 19-4901(b); Hedger v. State, 124 Idaho 49, 51, 855 P.2d 886, 888 (Ct. App. 1993) (affirming summary dismissal even where claim asserted fundamental error). In his post-conviction petition, Sanchez argued the trial court erred in allowing un-credible testimony by Tusi about self-torture, and that Sanchez committed battery 112 times even though she recalled only a few specific incidents. (R, pp. 3-7.) Also in his petition, Sanchez claimed that his sentence of 24 years fixed for a "60 year old crippled man . . . for exercising his right to go to trial" was "cruel and unusual punishment." (R., p. 11.) Sanchez did not raise these issues on direct appeal.

In support of these claims, Sanchez's petition provided only conclusory, non-specific allegations. (R., pp. 1-15.) Other than his own self-serving affidavit, he failed to present evidence that his allegations were valid. (R., pp. 14-15.) Regarding Sanchez's claim of cruel and unusual punishment, the district court noted, "there is nothing in the record in the underlying criminal case or in [the] post-conviction proceeding to suggest that the sentence resulted from Sanchez's exercise of his right to go to trial." (R., p. 113.) Sanchez thus failed to demonstrate either a "substantial doubt" about the jury's finding of his guilt, or a reason why these issues could not have been raised on direct appeal. See

Hedger, 124 Idaho at 51, 855 P.2d at 888. His assertions of trial court error are therefore barred. I.C. § 19-4901(b); Hedger, 124 Idaho at 51, 855 P.2d at 888.

E. Ineffective Assistance Of Counsel Claims Fail

In his post-conviction petition, Sanchez raised claims of ineffective assistance by both trial and appellate counsel. (R., pp. 2, 8-10.) Issues concerning the effectiveness of counsel are appropriately raised in post-conviction. Hernandez v. State, 132 Idaho 352, 355, 972 P.2d 730, 733 (Ct. App. 1998). To establish a claim of ineffective assistance of counsel, a petitioner must show both that his counsel performed deficiently, and that his defense was prejudiced as a result. Ridgley v. State, 148 Idaho 671, 675, 227 P.3d 925, 929 (2010) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)). The claimant has the burden of showing that counsel's representation fell below an objective standard of reasonableness, Strickland, 466 U.S. at 688, and but for counsel's deficient performance, it is reasonably probable the outcome would have been different, Id. at 694. There is a strong presumption that counsel has performed competently. Id. at 690.

1. Trial Counsel

In his post-conviction petition, Sanchez asserted three ineffective assistance of trial counsel arguments: (1) failure to win a pre-trial motion or to properly preserve the issue regarding exclusion of evidence that Tusi removed her own teeth; (2) failure to preserve the issue of excluding testimony about abuse from 1992 through 2007; and (3) failure to preserve an objection to the state's psychiatric expert witnesses. (R., p. 8-10.) As the district court properly

found, these issues were preserved by trial counsel, and raised by appellate counsel. (R., pp. 111-13.) The Court of Appeals considered the issues, ultimately deciding against Sanchez on each. Sanchez, Unpublished Opinion No. 415, pp. 5-13 (Ct. App. 2011). Thus, Sanchez failed to satisfy either element of an ineffective assistance of counsel claim, that counsel performed deficiently or that his defense was prejudiced. As to trial counsel, the claim unmistakably fails.

## 2. Appellate Counsel

Sanchez's post-conviction petition also asserted his appellate counsel performed deficiently by failing to petition to the Supreme Court for review of the Court of Appeals decision. (R., p. 2.) This claim fails because Supreme Court review of a Court of Appeals decision is purely discretionary. I.A.R. 118(b). There is no constitutional right to counsel to pursue discretionary review of an appellate decision.<sup>2</sup> Ross v. Moffitt, 417 U.S. 600, 615 (1974). Thus, counsel's failure to pursue discretionary review of an appellate decision does not deprive a defendant of constitutionally mandated effective assistance of counsel. Jakoski v. State, 136 Idaho 280, 286, 32 P.3d 672, 678 (Ct. App. 2001). As to appellate counsel, the claim also fails.

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<sup>2</sup> To the extent that Sanchez may argue counsel failed to exhaust state remedies precluding his ability to bring a federal habeas corpus claim, this argument fails because Sanchez has suggested no basis on which he could collaterally attack his conviction; Sanchez thus fails to show prejudice. See Hernandez v. State, 127 Idaho 685, 688, 905 P.2d 86, 89 (1995).

F. Post-Conviction Counsel Properly Denied

For these reasons, Sanchez failed to state a sufficient claim to warrant appointment of post-conviction counsel. Accordingly, the district court properly denied Sanchez's request.

II.

Sanchez Has Failed To Show Error In The District Court's Summary Dismissal  
Of His Post-Conviction Petition

A. Introduction

Having failed to satisfy the lower standard of a claim warranting appointment of counsel, Sanchez cannot meet his burden of showing the district court erred in summarily dismissing his petition. To the extent that Sanchez asserts lack of notice, this argument also fails.

B. Standard Of Review

When reviewing a district court's summary dismissal of a petition for post-conviction relief, the appellate court applies the same standard as that applied by the district court. Ridgley v. State, 148 Idaho 671, 675, 227 P.3d 925, 929 (2010). Petitions for post-conviction relief under Idaho's Uniform Post-Conviction Procedure Act, I.C. § 19-4901 et seq., are governed by Idaho's Rules of Civil Procedure. Id. at 674, 227 P.3d at 928 (citation omitted). But to avoid dismissal, a petition must state more than that required under Rule 8(a)(1). Id. It must provide specific grounds on which the application is based, along with admissible supporting evidence. Id. at 675, 227 P.3d at 929 (citation omitted); I.C. § 19-4903.



The district court may, on a party's motion or its own initiative, summarily dismiss (without a hearing) a petition for post-conviction relief. I.C. § 19-4906; Ridgley, 148 Idaho at 675, 227 P.3d at 929. The procedure for summary dismissal is equivalent to that for a summary judgment motion under I.R.C.P. 56. Ridgley, 148 Idaho at 675, 227 P.3d at 929 (citation omitted). Thus, dismissal is appropriate on determination that no "genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file." Id.

The court will regard petitioner's undisputed factual allegations as true, id. (citation omitted), and "will liberally construe the facts and reasonable inferences in favor of the non-moving party," Charboneau v. State, 144 Idaho 900, 903, 174 P.3d 870, 873 (2007) (Charboneau II). However, the court need not accept "mere conclusory allegations[ ] unsupported by admissible evidence, or the applicant's conclusions of law." Ridgley, 148 Idaho at 675, 227 P.3d at 929 (citation omitted).

C. Dismissal Was Pursuant To The State's Motion

Where the district court summarily dismisses a post-conviction petition on its own motion, without motion from the state, a petitioner is entitled to notice of the basis for the dismissal, and 20 days to respond. I.C. § 19-4906(b). If the state moves to dismiss, the motion serves as notice for which petitioner may respond under I.C. § 19-4906(c). Buss v. State, 147 Idaho 514, 517, 211 P.3d 123, 126 (Ct. App. 2009). However, if the district court dismisses on grounds other than those stated in the state's motion, the petitioner must be given notice and an opportunity to respond pursuant to I.C. § 19-4906(b). Id.

Here, the state filed a motion for summary dismissal. (R., pp. 66-67.) Although brief, the motion asserted that Sanchez's petition "fails to raise a genuine issue of material fact" with regard to his ineffective assistance of counsel and other claims. (R., p. 66.) According to the state, Sanchez's claims are "bare or conclusory, unsubstantiated by fact, procedurally defaulted, or clearly disproved by the record." (R., p. 66.) The district court ultimately dismissed Sanchez's petition on these same grounds, albeit with more detail. (R., pp. 109-14.)

In its decision on motion for summary judgment, the district court addressed procedural default, stating, "Many of Sanchez's claims were or could have been raised in the criminal proceedings or on direct appeal and are not proper for post-conviction proceedings." (R., p. 109.) The district court also noted that the record failed to support Sanchez's ineffective assistance of counsel claims. (R., pp. 110-13.) As to Sanchez's cruel and unusual punishment claim, the district court again pointed to the lack of support in the record. (R., p. 113.)

The district court relied on additional grounds, not identified in the state's motion, in dismissing Sanchez's claims. For example, as to ineffective assistance of appellate counsel, the district court cited Jakoski, 136 Idaho 280, 32 P.3d 672, discussed in Section I(E)(2) of this brief. (R., p. 110.) Regarding Sanchez's arguments of trial court error, the district court noted that the Court of Appeals had already decided the issues, thus acknowledging application of res judicata, addressed in Section I(C) of this brief. (R., pp. 112-13.) "When a

district court summarily dismisses a post-conviction application, relying in part on the same grounds presented by the state in its motion for summary dismissal, the notice requirement [of I.C. § 19-4906] has been met.” Buss, 147 Idaho at 517, 211 P.3d at 126 (citation omitted). Although the district court here relied in part on grounds not identified in the state’s motion, it also relied on grounds raised by the state. Under Buss, Sanchez was provided the required notice under I.C. § 19-4906.

Importantly, Sanchez did file a reply, opposing dismissal. (R., pp. 69-73.) The reply was filed after the state’s answer (R., pp. 60-63) and motion to dismiss (R., pp. 66-67), as well as the district court’s order denying counsel (R., pp. 26-31), which forecasted a dismissal for failure to state a valid claim. (R., p. 31.) Nothing in Sanchez’s reply suggests a request for clarification concerning the state’s arguments. (R., pp. 69-73.) Sanchez’s reply in fact reflects that the goals of statutory notice and an opportunity to respond were satisfied.

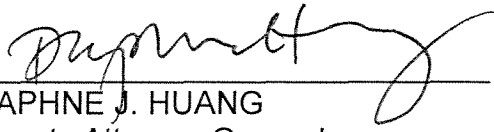
D. Claim Of Court Bias

In his appellate brief, Sanchez asserts, “bias is evident” where the court appears to “put[ ] the blame on an elderly mexican national [Sanchez].” (Appellant’s brief, p. 14.) This conclusory allegation lacks further detail or even an indication of the court or stage of proceedings to which it is directed. Given the complete absence of evidentiary support, this Court should reject the claim as unsubstantiated.

CONCLUSION

The state respectfully requests that the Court affirm the district court's denial of Sanchez's motion to appoint counsel and petition for post-conviction relief.

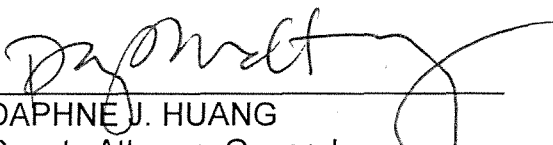
DATED this 13th day of May, 2013.

  
\_\_\_\_\_  
DAPHNE J. HUANG  
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 13th day of May, 2013, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

JOSE MANUEL SANCHEZ  
IDOC #92500  
ICC UNIT J  
PO BOX 70010  
BOISE, IDAHO, 83707

  
\_\_\_\_\_  
DAPHNE J. HUANG  
Deputy Attorney General

DJH/pm